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No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1972

72-962

HOWARD C. PHELPS, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH A. CALAMIA
JOHN L. FASHING
Attorneys for Petitioner
1604 State National Plaza
El Paso, Texas 79901

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CIRCUIT

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1972

HOWARD C. PHELPS, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Howard C. Phelps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on the 2nd day of November, 1972 with rehearing denied on December 14, 1972.

OPINION BELOW

The opinion of the court of appeals (App. A, pp. 14-15 infra) and its opinion denying rehearing (App. B, pp. 16-17 infra) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra, pp. 14-15)was entered on November 2, 1972. A petition for rehearing (App. B, infra, pp. 16-17) was denied on December 14, 1972. The mandate was

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issued December 22, 1972 (App.C, p. 18). The jurisdiction of this Court is involved under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the Fifth Circuit erred in light of SCREWS v UNITED STATES, 325 U.S. 91 (1944) in that the Fifth Circuit held that there was no plain error notwithstanding that the District Court's jury instructions amounted to virtually no charge and constituted a denial of due process and abridged Phelps' right to have his innocence or guilt determined by a jury upon proper instructions, as said instructions omitted those matters listed below:

a. Nowhere is the jury directed as to what facts, elements of the offenses, they must find to be true beyond a reasonable doubt before a conviction could result.

b. Not a word is said in the charge as to what is charged in the indictment, nor of what proof is necessary under it as to the elements of the offenses.

c. The jury was never told once that a not guilty verdict is necessary in the event of the failure by the government to prove each of the elements of the offenses charged beyond a reasonable doubt or to acquit if there is a reasonable doubt thereof.

d. The indictment was not read to the jury.

e. The jury instructions failed to require the jury to find where or when the offenses occurred or any other fact in regard thereto, except as to

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possession of a weapon not described.

f. No application of the abstract statutes read or offenses charged under the indictment were made to the facts, except an inadequate application to possession.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

A. United States Constitution

1. Amendment V to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeapordy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Amendment VI to the United States Constitution provides:

" In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to

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be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. Federal Legislation

The Gun Control Act of 1968, 26 U.S.C. §5801, et seq., the pertinent provisions of which are set forth in Appendix D, pp. 19 - 23

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on November 26, 1971 on three counts of a six count indictment. Counts 2, 3, and 6 under the indictment were dismissed by the government prior to the trial. Court 1 charged Phelps with engaging in business as a dealer in firearms without having paid a special occupational tax in violation of 26 U.S.C. §5861 (a). Count 4 charged Phelps with possession of a firearm, to wit: a rifle not registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. §5861 (d). Count 5 charged Phelps with possession of a firearm not identified by a serial number in violation of 26 U.S.C. §5861 (i). Each of these counts charged a "wilful and knowing" violation of the law. The District Court sentenced Phelps to five years imprisonment with probation and a $1,000 fine on each count on February 23, 1972. The District Court stayed the fine of $3,000 on April 6, 1972 pending Phelps' appeal . There had been an earlier appeal

by the government from an order of the District Court suppressing certain statements made by Phelps. Said appeal is reported as UNITED STATES v PHELPS, 5 Cir. 1971, 443 F. 2d 246.

The District Court's instructions are set forth in Appendix E, pp. 24 to 33. These instructions reflect that the District Court committed fundamental error in not submitting to the jury the essential ingredients of the offenses upon which Phelps' conviction must rest. Those charged with a Federal crime have a right to be tried by the standards of guilt which Congress and the Constitution have prescribed. The erroneous omissions in the District Court's instructions are reflected by the following parts of the charge:

" * * * As I told you in the beginning the law presumes a defendant to be innocent of a crime. Thus, a defendant, although accused, begins a trial with a clean slate, with no evidence against him, and the law permits nothing but legal evidence presented before the jury to be considered in support of the charges against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.
* * *

There are two types of evidence from which a jury may properly find a defendant guilty of a crime.
* * *
The law makes no distinction between direct and circumstantial evidence but simply requires that

before convicting a defendant a jury be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence.

* * *

The government must prove to your satisfaction beyond a reasonable doubt that the accused either alone or jointly with others had actual or constructive possession of the weapon that is described in the indictment.

* * *

Now you will have the three counts that the defendant stands charged with. They involve these articles --- sections of the U.S. Code.

* * *

These are all the statutes I have been reading to you that this indictment is prepared under. You will have a copy of the indictment with you when you retire to consider your verdict and when you do retire you will select your foreman.

* * *

The verdict reads ' We the jury find the defendant Howard C. Phelps ..." and you will put in there either guilty or not guilty 'as charged in the first count of the indictment;' and guilty or not guilty 'as charged in the fourth count of the indictment' and guilty or not guilty 'as charged in the fifth count of the indictment' .

* * *

You will write in 'guilty' or 'not guilty' in each one of those blanks as you may determine it."

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has decided a federal question in a way in conflict with decisions of this Court and other Circuit Courts and has sanctioned such a departure by the District Court from the duty of a lower court to instruct the jury after the arguments on each element of the offenses charged as to call for an exercise of this Court's power of supervision. In SCREWS v UNITED STATES, 1944, 325 U.S. 91 at 107, this Court stated that " It is true that no exception was taken to the trial court's charge. * * * And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

1. The government requested the trial court to read to the jury the statutes involved in this case. The district court did read such statutes, 26 U.S.C. §5801, 5842, 5843, 5845 and 5861, along with extensive parts thereof that had no application to the indictment under which Phelps was charged. The trial court did not read the indictment to the jury at the end of the case, but merely told the jury that the indictment would be in the jury room. The record does not reflect whether the jury had the indictment in the jury room or whether the jury ever read it or considered it.

2. The above jury instructions did not set out the elements of the three offenses for which Phelps was indicted. A mere reading of abstract statutes and other boiler plate instructions does not constitute an instruction on the elements of the offense. The jury was never told to acquit if the government failed to prove beyond a reasonable doubt any of the elements of the offenses or to acquit if they had a reasonable doubt as to the elements. The jury was never told to treat each count under the indictment separately.

3. Considering the extensive abstract statutes read to the jury, the jury may have well found Phelps guilty of crimes not even contained in the indictment. In STREET v NEW YORK, 1969 394 U.S. 576, a conviction was reversed where it could not be determined whether it was based upon a constitutional or unconstitutional ground. This rule should be applied in this case as Phelps may well have been convicted of a crime for which he was not indicted.

4. The Fifth Circuit has in effect announced a new rule that a trial court need not tell a jury the essential ingredients of the crimes alleged in the indictment, but can merely read abstract statutes which include many crimes not charged and send the indictment to the jury room. In CAMPBELL v UNITED STATES, 5 Cir. 1948, 167 F. 2d 451, the Court held that a charge consisting chiefly of reading of the statutes allegedly violated, without a word as to " exactly what is charged in the count, nor of what proof is necessary under it * * * amounts to there having been virtually no charge, and therefore there is reversible error" . The Fourth Circuit in UNITED STATES v HARRIS, 4 Cir. 1965, 346 F. 2d 182, 184, held that the omission of not outlining the elements of the crime to the jury was not supplied by the reading of the statute to the jury, for "in every criminal prosecution, we have heretofore insisted,

an exposition of the constituents of the offense is mandatory and indispensible. Screws v. United States, 325 U.S. 91, 106-107. " See ROE v UNITED STATES, 5 Cir. 1961, 287 F.2d 435, 440-441; McAFEE v UNITED STATES, D.C. Cir. 1939, 105 F.2d 21, 29-30, where the court tells "it should be orthodox practice somewhere in the instructions to tell the jury once in precise terms that a not guilty verdict is necessary in the event of failure by the Government to prove each of the elements of some offense beyond a reasonable doubt" . In the case at bar the jury was never told in any language to acquit Phelps should the government fail to prove each element of the offense beyond a reasonable doubt. See WILLIAMS v UNITED STATES, D.C. Cir. 1942, 131 F.2d 21, 22. In UNITED STATES v NOBLE , 3 Cir. 1946, 155 F.2d 315, the court held it was plain error not to give the jury the essential elements of the crime and merely sending the information out with the jury will not correct the error, as "not only are counsel and the defendant entitled to hear the instructions * * * but it is equally important to make as certain as may be that each member of the jury has actually received the instructions" . See BYRD v UNITED STATES, D.C. Cir. 1965, 342 F.2d 939, 941.

In POLANSKY v UNITED STATES, 1 Cir. 1964, 332 F.2d 233, it was held plain error to give an instruction on law not charged for such can "only serve to mislead the jury". A jury cannot be assumed to "know enough to disregard the judge's bad law if in fact he misguides them". BOLLENBACK v. UNITED STATES, 1946, 326 U.S. 607, 613-614. See BISHOP v UNITED STATES, 8 Cir. 1926, 16 F.2d 406; DE MAYO v UNITED STATES, 8 Cir. 1929, 32 F.2d 472, 475; UNITED STATES v HARMAN, 4 Cir. 1963, 323 F.2d 650.

5. The jury was never told that they must find beyond a reasonable doubt any of the following essential elements of the crimes charged:

a. That Phelps engaged in business as a dealer in firearms and did not pay the special tax. Count One of the Indictment.

b. That the firearm was not registered; that it was subject to registration; that the weapon was in fact a firearm and that Phelps knew it was a firearm.
Count Four of the Indictment.

c. That the weapon was in fact a firearm; that Phelps knew it and that the weapon was not identified by a serial number.
Count Five of the Indictment.

In UNITED STATES v WILLIAMS, D.C.Cir. 1972, 463 F.2d 958, the court found plain error and tells as follows:

"Nowhere in the instructions is there to be found one setting forth the essential elements constituting the crime of attempted robbery, the underlying felony upon which defendant's conviction on Count One (felony-murder) is predicated.

' This court has placed great importance upon the manner in which a jury is instructed as to the elements of a crime. We have held that any omission of an element of a crime in the instructions to the jury is plain error under Rule 52(b) of the Fed. R.Crim. P. See Byrd v. United States, 119 U.S.App.D.C. 360, 342 F.2d 939 (1965); Jackson v. United States, 121 U.S.App.D.C. 160, 348 F.2d 772 (1965)'. United States v. Gaither, 142 U.S. App.D.C. 234, 440 F.2d 262 (1971) "

In WRIGHT, FEDERAL PRACTICE & PROCEDURE (Criminal) 487 at pp. 300-301 (1969) the following statement is found:

"It is a grave error to submit the case without accurately defining the offense charged and its elements. Such an error is not excused or waived by failure to request a proper instruction. The test is whether the instruction leaves no doubt as to the circumstances under which the crime can be found to have been committed. A mere reference to the information or indictment is not sufficient. The Court must define the offense charged in clear and precise language rather than by reference to a document in the jury's possession."

In DODSON v UNITED STATES, 4 Cir. 1928, 23 F. 2d 401-403, the court held that a jury must be guided in their deliberations by the instructions given at the end of the trial and instructions given at the start of the trial cannot replace those instructions that must be given at the close of the evidence. Rule 30 F.R.C.P.

6. Count One of the indictment in this case reads in part as follows:

" That on or about November 20, 1969 * * * Howard C. Phelps wilfully and knowingly engaged in business as a dealer in firearms without having paid the special (occupational) tax required by Section 5801, Title 26 * * *" .

Count Four of the indictment herein reads in part as follows:

" That on or about November 20, 1969 * * * Phelps wilfully and knowingly possessed a firearm, that is, a model 33 Remington Single Shot Bolt Action, .22 caliber rifle * * * which had not been registered to him in the National Firearms Registra-

tion and Transfer Record * * * ".

Count Five of the indictment herein reads in part as follows:

"That on or about November 20, 1969 * * * Phelps wilfully and knowingly possessed a firearm, that is, a Model 33 Remington Single Shot Bolt Action, .22 caliber Rifle * * * which was not identified by a serial number, required by Section 5841, Title 26 * * * ."

Mr. Justice Brennan in his concurring opinion in UNITED STATES v FREED, 1971, 401 U.S. 601, 6 tells that under 26 U.S.C. 5861 (d) a willing and conscious possession and a knowledge that the item alleged were firearms must be proved by the gove ment along with the unregistered status of the fire- arms. See BRYAN v UNITED STATES, 5 Cir. 196 373 F.2d 403.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH A. CALAMIA

JOHN L. FASHING

Attorneys for Petitioner
Howard C. Phelps
1604 State National Plaza
El Paso, Texas 79901

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CERTIFICATE OF SERVICE

I, JOHN L. FASHING, one of the attorneys for the petitioner HOWARD C. PHELPS, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 5th day of January 1973 I served three copies of the foregoing petition for writ of certiorari each, on the following:

1. On Ralph Harris Assistant United States Attorney for the Western District of Texas, El Paso Division, by mailing him three copies of the same at his offices, Federal Courthouse Building, El Paso, Texas 79901.

2. On the United States by mailing three copies thereof in a duly addressed envelope, with airmail postage prepaid, to Honorable Erwin Griswold, United States Solicitor General, United States Department of Justice, Washington, D. C.

John L. Fashing

JOHN L. FASHING

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APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1584

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HOWARD C. PHELPS,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

(November 2, 1972)

Before DYER, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: Appellant Howard C. Phelps was convicted under 26 U.S.C. § 5861(a) for being a dealer in firearms without having paid the requisite occupational tax, under 26 U.S.C. § 5861(d) for possessing an unregistered firearm, and under 26 U.S.C. § 5861(i) for possession of a firearm not identified with a serial number. In this appeal appellant asserts several different grounds which he contends require reversal.

This court feels that only one of the asserted errors merits discussion. Appellant maintains that the jury was not properly instructed on knowing possession, reasonable doubt, burden of proof, and the contents of the indictment. To prevail on this point, appellant must establish that the instructions given were plain error since no objection to the instructions was made at the conclusion of the charge. See Rules 30 and 52(b), F.R.Crim.P.; *United States* v. *Smith*, 5 Cir. 1970, 435 F.2d 832; *United States* v. *Lawrence*, 5 Cir. 1970, 427 F.2d 95.

This court has studied the charge given by the district court and we are satisfied that if there was any error, it clearly did not rise to the level of plain error, and reversal is not required.

We have carefully considered the other assertions of this appellant and find them to be without merit. Therefore, appellant's conviction is

AFFIRMED.

Adm. Office, U. S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1584

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HOWARD C. PHELPS,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Nov. 2, 1972, 5 Cir., 1972, ____ F.2d ____).

(December 14, 1972)

Before DYER, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regu-

lar active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX "C"

United States Court of Appeals

FIFTH CIRCUIT

ARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP ST.
NEW ORLEANS, LA. 70130
(504) 527-6810

December 22, 1972

Mr. Dan W. Benedict, Clerk
U. S. District Court
108 U. S. Courthouse
El Paso, Texas 79901

No. 72-1584 - U.S.A. vs. Howard C. Phelps
(District Court No. EP 70-CR-14)

Dear Sir:

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

(X) Original record on appeal or review. (2 VOLUMES & 1 SUPPLEMENTAL

( ) Original exhibits.

( ) Bill of Costs approved by this Court.

( ) The judgment provides that appellee pay the costs in this Court. Since the case was docketed in forma pauperis without pre-payment of fees and costs, the Clerk's docketing fee of $25.00 is now payable to this office by appellee, and by copy of this letter counsel is being so advised.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Marguette K. Farley
Deputy Clerk

/mkf

enc. (LETTER ONLY)
cc: Mr. Joseph A. Calamia
Mr. Ralph E. Harris

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APPENDIX "D"

§ 5801. Tax

On first engaging in business and thereafter on or before the first day of July of each year, every importer, manufacturer, and dealer in firearms shall pay a special (occupational) tax for each place of business at the following rates:

(1) Importers.—$500 a year or fraction thereof;

(2) Manufacturers.—$500 a year or fraction thereof;

(3) Dealers.—$200 a year or fraction thereof.

Except an importer, manufacturer, or dealer who imports, manufactures, or deals in only weapons classified as "any other weapon" under section

5845(e), shall pay a special (occupational) tax for each place of business at the following rates: Importers, $25 a year or fraction thereof; manufacturers, $25 a year or fraction thereof; dealers, $10 a year or fraction thereof.

Added Pub.L. 90-618, Title II, § 201, Oct. 22, 1968, 82 Stat. 1227.

§ 5841. Registration of firearms

(a) Central registry.—The Secretary or his delegate shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include—

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered.—Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered.—Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this act.—A person shown as possessing a firearm by the records maintained by the Secretary or his delegate pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration.—A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary or his delegate upon request.

Added Pub.L. 90-618, Title II, § 201, Oct. 22, 1968, 82 Stat. 1229.

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§ 5842. Identification of firearms

(a) Identification of firearms other than destructive devices.—Each manufacturer and importer and anyone making a firearm shall identify each firearm, other than a destructive device, manufactured, imported, or made by a serial number which may not be readily removed, obliterated, or altered, the name of the manufacturer, importer, or maker, and such other identification as the Secretary or his delegate may by regulations prescribe.

(b) Firearms without serial number.—Any person who possesses a firearm, other than a destructive device, which does not bear the serial number and other information required by subsection (a) of this section shall identify the firearm with a serial number assigned by the Secretary or his delegate and any other information the Secretary or his delegate may by regulations prescribe.

(c) Identification of destructive device.—Any firearm classified as a destructive device shall be identified in such manner as the Secretary or his delegate may by regulations prescribe.

Added Pub.L. 90–618, Title II, § 201, Oct. 22, 1968, 82 Stat. 1230.

§ 5843. Records and returns

Importers, manufacturers, and dealers shall keep such records of, and render such returns in relation to, the importation, manufacture, making, receipt, and sale, or other disposition, of firearms as the Secretary or his delegate may by regulations prescribe.

Added Pub.L. 90–618, Title II, § 201, Oct. 22, 1968, 82 Stat. 1230.

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§ 5845. Definitions

For the purpose of this chapter—

(a) Firearm.—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun.—The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) Rifle.—The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(d) Shotgun.—The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

(e) Any other weapon.—The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

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(f) **Destructive device.**—The term "destructive device" means any explosive, incendiary, or poison gas (A) bomb, (B) grenade, rocket having a propellent charge of more than four ounces, (D) sile having an explosive or incendiary charge of more than one-q ounce, (E) mine, or (F) similar device; (2) any type of weap whatever name known which will, or which may be readily convert expel a projectile by the action of an explosive or other propellan barrel or barrels of which have a bore of more than one-half inch ameter, except a shotgun or shotgun shell which the Secretary delegate finds is generally recognized as particularly suitable for sp purposes; and (3) any combination of parts either designed or int for use in converting any device into a destructive device as defin subparagraphs (1) and (2) and from which a destructive devic be readily assembled. The term "destructive device" shall not in any device which is neither designed nor redesigned for use as a we any device, although originally designed for use as a weapon, wh redesigned for use as a signaling, pyrotechnic, line throwing, safe similar device; surplus ordnance sold, loaned, or given by the Sec of the Army pursuant to the provisions of section 4684(2), 4685, or of title 10 of the United States Code; or any other device whic Secretary of the Treasury or his delegate finds is not likely to be u a weapon, or is an antique or is a rifle which the owner intends solely for sporting purposes.

(g) **Antique firearm.**—The term "antique firearm" means any arm not designed or redesigned for using rim fire or conventiona ter fire ignition with fixed ammunition and manufactured in or 1898 (including any matchlock, flintlock, percussion cap, or simila of ignition system or replica thereof, whether actually manufa before or after the year 1898) and also any firearm using fixed nition manufactured in or before 1898, for which ammunition longer manufactured in the United States and is not readily av in the ordinary channels of commercial trade.

(h) **Unserviceable firearm.**—The term "unserviceable firearm" a firearm which is incapable of discharging a shot by means of plosive and incapable of being readily restored to a firing condition

(i) **Make.**—The term "make", and the various derivatives of word, shall include manufacturing (other than by one qualified gage in such business under this chapter), putting together, alterin combination of these, or otherwise producing a firearm.

(j) **Transfer.**—The term "transfer" and the various derivati such word, shall include selling, assigning, pledging, leasing, lo giving away, or otherwise disposing of.

(k) **Dealer.**—The term "dealer" means any person, not a manufa or importer, engaged in the business of selling, renting, leasing, or ing firearms and shall include pawnbrokers who accept firearms lateral for loans.

(l) **Importer.**—The term "importer" means any person who gaged in the business of importing or bringing firearms into the States.

(m) **Manufacturer.**—The term "manufacturer" means any perso is engaged in the business of manufacturing firearms.

Added Pub.L. 90-618, Title II, § 201, Oct. 22, 1968, 82 Stat. 123

§ 5861. Prohibited acts

It shall be unlawful for any person—

(a) to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax required by section 5801 for his business or having registered as required by section 5802; or

(b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or

(c) to receive or possess a firearm made in violation of the provisions of this chapter; or

Note 1

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter; or

(g) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter; or

(h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered; or

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or

(j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter; or

(k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or

(l) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

Added Pub.L. 90–618, Title II, § 201, Oct. 22, 1968, 82 Stat. 1234.

THE COURT: Lady and gentlement of the jury at this time the Court will give you the instru ions as to the law you will apply to the facts as you find them in this case.

As I told you in the beginning, and I will tell you again several times in the course of the instru ions, that you are the exclusive judges of the credi bility of the witnesses and the weight to be given t their testimony. You determine what the facts are. You determine it from the evidence that you have heard here this afternoon and from that evidence alone and then when you find what the facts are, from that evidence you apply the law tha I give you now.

You are not to consider whether you like or dislike the law that is involved or whether you lik or dislike the attorneys involved or like or dislike the defendant. As I told you in the beginning, that nothing to do with the case. It is a law. The defend stands charged with violating it. Whether it is a g or bad law, you just determine what the facts are f the evidence here and you are to weigh the testimo of these witnesses and when you find the facts you apply the law that I give you to those facts.

You will not single out any one instruction as stating the law but consider all the instructions as a whole. Regardless of any opinion you may have as to what the law ought to be, it would be a violat of your sworn duty to place a verdict upon any oth view of the law than that given in these instruction as it would be a violation of your sworn duty as jud of the facts to base a verdict upon anything but the evidence in this case.

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Now the government and the defendant are each entitled to a fair and impartial verdict from you. As I told you in the beginning the law presumes a defendant to be innocent of a crime. Thus a defendant, although accused begins a trial with a clean slate, with no evidence against him, and the law permits nothing but legal evidence presented before the jury to be considered in support of the charges against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt based upon reason and commonsense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is such as you would be willing to rely and act upon in the most important of your own affairs. Now as I told you in the beginning, and I will repeat to you again, an indictment-- this indictment is but a formal method of accusing a defendant. It isn't evidence and it doesn't create any inference. The only evidence in the case is what you have heard here this afternoon.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence such as the testimony of an eye witness . The other is circumstantial evidence; that is, the proof of a chain for circumstances pointing to the commission of the offense. The law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant a jury be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence.

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As I told you before the statement and arguments--opening statements and closing arguments of counsel are not evidence. The evidence in the case consists of the sworn testimony of the witnesses, regardless of who may have called them and all the exhibits received in evidence, regardless of who may have produced them. Any evidence as to which an objection was sustained by the Court or ordered stricken by the Court, you will disregard.

Now in that connection there have been certain objections made by the attorneys on each side. That is the duty of an attorney, to make an objection when he thinks it doesn't comply with the rules of evidence or some other rule in law. Don't give any consideration to the fact that he makes an objection. They are not trying to keep something away from you that you should hear but they are exercising their duty to the client. If they think there is some evidence that shouldn't be admitted or some other question so far as the propriety of the case--don't give any consideration to that. If I admit the evidence you consider it. If I exclude it you give no regard to it whatever.

Now while you are to consider only the evidence in the case you are not limited to the bald statements of the witnesses. In other words you are not limited solely to what you see and hear as the witnesses testify. On the contrary you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified to you in the light of your own experience. You don't leave your commonsense behind you when you go into the jury room.

As you know, an inference is a deduction or conclusion which your reason and commonsense leads you to draw from the facts which you find have been established from the evidence offered in this case. Again I will tell you while you are to accept the law as I give it to you you are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You determine that from the evidence and apply this law as I give it to you. You can consider the testimony, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witnesses intelligence, his motive, state of mind, demeanor and manner while on the stand. You can consider the relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict and the extent to which if at all each witness is either supported or contradicted by other evidence in the case. Inconsistency in the testimony of the witnesses may or may not cause the jury to discredit the testimony. If two or more persons witness an incident or transaction they may see it or hear it differently. You are the ones that determine that. You determine the witnesses you believe, the weight to give to their testimony to determine what the facts are in this case. Nor ordinarily in a case of this kind the defendant is not required to testify but he may do so. If he wishes to testify he is a competent witness. You weigh his testimony. You consider his position, you consider his interests, just as you do the other witnesses, his motive in testifying, the interest he has in the case and the outcome of it. You judge his testimony the same way as any other

other witness. You weigh it and determine what you believe or do not believe.

Now the law recognizes two kinds of possession, actual possession and constructive possession.

A person who knowingly has direct physical control over the thing at a time is in actual possession.

A person, although not in actual possession, who knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is in constructive possession of it.

The law recognizes also that possession may be sole or joint. Two or more persons can share actual or constructive possession and if so it is joint.

The government must prove to your satisfaction beyond a reasonable doubt that the accused either alone or jointly with others had actual or constructive possession of the weapon that is described in the indictment.

Now you will have the three counts that the defendants stands charged with. They involve these articles--sections of the US Code.

Section 5801 of Title 26 provides that " On first engaging in business, and thereafter on or before the first day of July of each year, each importer, manufacturer, and dealer in firearms shall pay a special occupational tax for each place of business at the following rates: Importers, $500.00 a year or fraction thereof; Manufacturers, $500.00 a year or fraction thereof; Dealers, $200.00 a year or fraction thereof. Except an importer, manufacturer, or dealer who imports, manufactures, or deals in

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only weapons classified as 'any other weapon' under Section 5845 (e), shall pay a special occupational tax for each place of business."

Now Section 5841 provides that "The Secretary or his delegate shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include identification of the firearms, date of registration and identification and address of person entitled to possession of the firearm. Each manufacturer, importer and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

Each manufacturer shall notify the Secretary or his delegate of the manufacturer of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker and transferor of a firearm shall prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

A person shown as possessing a firearm by the records maintained by the Secretary or his delegate pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

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A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary or his delegate upon request.

Each manufacturer and importer and anyone making a firearm shall identify each firearm, other than a destructive device, manufactured, imported, or made by a serial number which may not be readily removed, obliterated, or altered, the name of the manufacturer, importer or maker, and such other identification as the Secretary or his delegate may by regulations prescribe.

Any person who possesses a firearm, other than a destructive device, which does not bear the serial number and other information required by sub-section (a) of this section shall identify the firearm with a serial number assigned by the Secretary or his delegate and any other information the Secretary or his delegate may by regulations prescribe.

Any firearm classified as a destructive device shall be identified in such manner as the Secretary or his delegate may by regulations prescribe.

Importers, manufacturers and dealers shall keep such records of, and render such returns in relation to, the importation, manufacturer, making, receipt, and sales, or other disposition of firearms as the Secretary or his delegate may by regulations prescribe.

A firearm, as defined in Section 5845 means " (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of le

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16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in sub-section (e); (6) a machine gun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term firearm' shall not include an antique firearm or any device, other than a machine gun or destructive device, which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacturer, value, design and other characteristics is primarily a collector's item and is not likely to be used as a weapon."

By the term "rifle" as used in this charge means "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger and shall include any such weapon which may be readily restored to fire a fixed cartridge."

As used in this charge "the term 'dealer' means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawn brokers who accept firearms as collateral for loans."

Section 5861 provides "it shall be unlawful for any person to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special occupational tax required by Section 5801 for his business as having registered as required by Section 5802."

It shall be unlawful for any person "to receive

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or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

It shall be unlawful for any person" to receive or possess a firearm which is not identified by a serial number as required by this chapter."

I think I have covered all of those.

MR. HUDSPETH: Those are all the statutes, Your Honor.

THE COURT: These are the statutes I have been reading to you that this indictment is prepared under. You will have a copy of the indictment with you when you retire to consider your verdict and when you do retire you will select your foreman. The foreman will preside over your deliberations. He will permit each one of you to express your views and then he will call for the vote and when you have arrived at a unanimous verdict in the case then he will be the one to sign the verdict. The verdict reads " We the jury find the defendant Howard C. Phelps . . ." and you will put in there either guilty or not guilty "as charged in the first count of the indictment;" and guilty or not guilty "as charged in the fourth count of the indictment;" and guilty or not guilty "as charged in the fifth count of the indictment" .

On each one of these counts there will be a separate vote and each one must be unanimous. While there are only three counts they are numbered counts one, four and five, so you will take a vote on each one and it must be a unanimous verdict. You will write in "guilty" or "not guilty" in each one of those blanks as you may determine it.

MR. HUDSPETH: Your Honor, the Court may not be through but I understood you would give the definition of knowingly and wilfully.

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THE COURT: Yes, I want to read to you those definitions.

Each count of the indictment in this case alleges that the acts charged were done knowingly and wilfully. An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reasons.

An act is done wilfully if done voluntarily and intentionally with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

You will have the exhibits with you in the jury room and the indictment, and if you have any questions you will write it out and the foreman will sign it and hand it to Mr. Carney, the Bailiff who will be outside your door. If you want anything he will attend to your needs. You will have the two exhibits that were offered here and the weapon that is involved in this case.

You may retire at this time with the Bailiff.

(WHEREUPON THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE AND HEARING OF THE JURY)

THE COURT: All right, Mr. Hudspeth, do you have any objections to the charge?

MR. HUDSPETH: No, Your Honor, we have none.

THE COURT: All right. We will take a short recess.

(WHEREUPON COURT WAS RECESSED)

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-962

HOWARD C. PHELPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on three counts charging violations of the federal firearms laws. 26 U.S.C. 5861(a), (d), and (i), set forth at Pet. App. 23. He was sentenced to concurrent terms of probation for five years and fined $1,000 on each count. The court of appeals affirmed, 468 F. 2d 828 (Pet. App. 14-15).

The single issue is whether the district court committed plain error in failing to instruct the jury specifically as to each element of the offenses charged. We submit that the court of appeals properly held that, in the circumstances presented here, "if there was any error, it clearly did not rise to the level of plain error" (Pet. App. 15).

1. The evidence showed that in November 1969, Alcohol, Tobacco and Firearms Investigators Hupp and Watkins, together with two local police officers, entered petitioner's pawn shop in El Paso, Texas, to conduct a compliance investigation with respect to the record-keeping requirements of the Gun Control Act of 1968 (A. 139-142).[1] As they entered the shop, Hupp saw in a display case a weapon bearing a price tag of $15.95. The weapon, made from a rifle, was about 19 inches long and had a barrel approximately 10 inches long.[2] Petitioner handed the weapon to Hupp, who determined that it contained no serial number and that it was fully operable (A. 143-145). Petitioner's records did not indicate when or how the weapon had been received (A. 156-157).

Hupp testified that he offered petitioner an opportunity to "abandon" the firearm to the government but that petitioner replied, " 'I am not going to abandon anything. That is my property you are taking.' " Petitioner also stated that he intended to sell the weapon (A. 172, 176).

The prosecution introduced evidence that the weapon was not registered to petitioner in the National Firearms Registration and Transfer Record, and that petitioner had not been issued a Special Tax Stamp to operate as a firearms dealer pursuant to 26 U.S.C. 5801.

Petitioner testified on his own behalf that he had not seen the weapon before the investigators called it to his

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[1] "A." refers to the Appendix in the court below, a copy of which we are lodging with the Clerk of this Court.

[2] 26 U.S.C. 5845(a) provides, in part:

> The term "firearm" means * * * (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length * * *.

attention, and that he was not aware that he had an illegal weapon on his premises (A. 163, 165). He stated that he had several employees (including his wife and three sons), each of whom had authority to place merchandise in display cases and to place price tags on merchandise (A. 163-164, 166). He also testified that he does not personally handle all the buy-and-sell and loan transactions in his pawn shop (A. 164-165).

2. At the close of the evidence, there was a brief conference out of the presence of the jury concerning instructions (A. 177-178). Defense counsel had submitted a requested instruction, which the court agreed to deliver, and the prosecutor asked that the relevant portions of the applicable statutes be read to the jury.

During closing argument, defense counsel focused on two issues. He argued that the evidence was not sufficient to prove that petitioner was a dealer in firearms, as those terms are defined in the Act, and he invited the jury's attention to the definition of those terms that the court would give in its instructions (A. 184-185). Though he conceded that petitioner had not paid the special tax, he urged that the evidence showed, at most, a single instance when petitioner had a "firearm." "There is no evidence that he ever actually sold one to anyone. There is no evidence there had been any other transactions of this type * * *" (A. 186). Second, counsel argued that petitioner's possession of the weapon was not wilful and knowing as charged in the indictment (A. 186-191). Co-counsel emphasized the same point (A. 193).

3. The court then gave the instructions that are reproduced at Pet. App. 24-33. The jury was instructed concerning their province as the exclusive judges of credibility, the presumption of innocence, the reasonable doubt standard, and direct and circumstantial evidence (Pet.

App. 24-28). The court explained the difference between actual and constructive possession, and stated that the government must prove beyond a reasonable doubt that petitioner had actual or constructive possession of the weapon described in the indictment (Pet. App. 28).

The court then read to the jury the relevant statutory provisions, including the requirement that a firearms dealer pay the special occupational tax, the prohibitions against possessing a firearm that is not registered in the National Firearms Registration and Transfer Record or that is not identified by a serial number, and the definitions of "firearm," "rifle," and "dealer" (Pet. App. 28-32). The court gave standard definitions of "knowingly" and "wilfully" (Pet. App. 33). It explained that the jury would be given a copy of the indictment, and that it must reach a unanimous verdict on each of the three counts charged (Pet. App. 32).

The judge then asked defense counsel if he had any objections to the charge, to which counsel replied that he had none (Pet. App. 33).

4. Petitioner claims, in essence, that the court's failure to give separate instructions with respect to each element of the offenses charged was plain error requiring reversal, notwithstanding counsel's expression of satisfaction with the instructions as given. See Rules 30 and 52(b), Federal Rules of Criminal Procedure. We agree that the better practice, even in simple cases, is for the court to set forth separately in its instructions each element of the crimes charged. In some circumstances the failure to do so may be reversible error. But, as the court below held, the more abbreviated approach—here, reading the relevant statutes to the jury—is not necessarily plain error in every case.

Where the circumstances of a particular case indicate that the jury was adequately informed of those elements of the offense that were actually put in issue during the trial, and especially when the statutory language read to the jury states the remaining elements of the offense in plain words, the courts of appeals have ruled that the failure to instruct separately as to each element does not amount to plain error. See, *e.g., United States* v. *Prujansky,* 415 F. 2d 1045 (C.A. 6); *Olar* v. *United States,* 391 F. 2d 773 (C.A. 9); *United States* v. *Schmidt,* 376 F. 2d 751 (C. A. 4), certiorari denied, 389 U.S. 884; *Walker* v. *United States,* 342 F. 2d 22 (C.A. 5), certiorari denied, 382 U.S. 859.

That is the situation here. The offenses charged were easily understood: that petitioner had engaged in the business of dealing in firearms without payment of the special occupational tax; that he had wilfully and knowingly possessed a particularly described firearm which had not been registered to him in the National Firearms Registration and Transfer Record; and that he had wilfully and knowingly possessed that firearm when it was not identified by a serial number. The only factual questions placed in issue by petitioner at trial were whether he was a "dealer" in firearms and whether his possession of the firearm was wilful and knowing. The district court instructed the jury as to the meaning of possession and explained that the prosecution had to prove beyond a reasonable doubt that petitioner had possession of the firearm. The judge read the statutory definitions of "dealer" and "firearm," neither of which is difficult to comprehend.[3] And, at

[3]A portion of the definition of firearm is set forth in note 2, *supra.* Dealer is defined as "any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawn brokers who accept firearms as collateral for loans." 26 U.S.C. 5845(k).

petitioner's request, he instructed as to the meaning of "wilfully and knowingly." The jury, to whom the indictment had been read at voir dire (A. 230-231), was provided with a copy of the indictment during its deliberations.

In these circumstances, the court of appeals properly concluded that, since the jury was adequately instructed on the only matters in dispute, any defect in the instructions did not so affect petitioner's substantial rights that reversal was required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.